

TEACHERS' RETIREMENT BOARD

INVESTMENT COMMITTEE

OPEN SESSION

SUBJECT: ADM Amicus Curiae Brief in U.S. Supreme Court

ITEM NUMBER: 7

ATTACHMENT(S): No

ACTION: X

DATE OF MEETING: November 4, 1998

INFORMATION: _____

PRESENTER(S): Mr. Waddell

On September 29, 1998, the United States Supreme Court granted a Petition for Writ of Certiorari filed by the California Public Employees' Retirement System (CalPERS) and the Florida State Board of Administration (SBA) which challenged a decision made by the United States Court of Appeals for the Seventh Circuit in shareholder derivative litigation brought against directors of the Archer Daniels Midland Company (ADM). CalSTRS has been asked to allow its name to be used in support of an amicus curiae brief that is being filed in support of CalPERS and SAB by several large institutional investors. CalSTRS is not being asked for a financial contribution to the legal costs, which are being underwritten by the Council for Institutional Investors.

Background:

Following a major criminal investigation of price-fixing allegations, on October 15, 1996 ADM pleaded guilty to criminal antitrust charges and paid a \$100 million criminal fine. Another \$90 million was spent by ADM to settle three civil antitrust lawsuits filed by competitors of ADM.

Thereafter, several shareholder derivative actions were filed against ADM directors. These suits alleged that ADM directors had breached their fiduciary duties to stockholders by failing to supervise company employees properly, and sought recovery of the \$190 million paid by ADM in criminal fines and civil settlements.

After an apparently lackluster job of prosecuting this litigation, plaintiff's counsel ultimately agreed to a settlement of \$8 million, which was to be exclusively allocated to present and future attorney's fees. No funds were to be returned to the corporation or its shareholders. Although the settlement also included governance reforms, these reforms did not materially go beyond those previously adopted voluntarily by ADM.

In response to an invitation by the District Court to Shareholders of record to appear in support of or in opposition to the proposed settlement, CalPERS and SBA appeared and asked

the court to reject the settlement on grounds that it provided a disproportionately high benefit to plaintiffs' counsel and that the corporate governance provisions did not materially benefit the shareholders. Notwithstanding these objections, the settlement was approved and CalPERS and SBA attempted to appeal this ruling to the Seventh Circuit Court of Appeals.

Legal Issue Before the Supreme Court

The Seventh Circuit Court refused to consider CalPERS' and SBA's appeal because they had not intervened as parties in the case. (*Felzen, et.al.v. Andreas, et.al.* (7th Cir. 1998) 134 F.3d 873, 876). The net result of this holding is that in order to appeal a District Court determination of settlement in a shareholder derivative action, any shareholder of the affected corporation, including institutional investors such as STRS, would had to have previously gone to the time and expense of formally intervening in the underlying litigation.

This decision conflicts with the applicable rule in another Circuit Court of Appeals, and this likely contributed to the decision by the Supreme Court to hear the case. The legal issue involved is relatively narrow, and will be addressed by CalPERS and SBA in their briefs. The amicus curiae, or "friend of the court" brief in which CalSTRS is being asked to join will instead focus on the policy implications of the appellate court's decision. Although a draft of the brief is not available as of this writing, we anticipate that it will focus on the costly, unnecessary procedural hurdle that requiring formal intervention would present to institutional investors in fully participating in the consideration of settlements that may be adverse to their interests as shareholders. Other retirement systems joining in the brief include the Colorado Public Employees' Retirement Association, the State of Wisconsin Investment Board, and the Los Angeles County Employees' Retirement Association.

Recommendation:

The Legal Office recommends that subject to the approval by the Chief Counsel of the proposed amicus brief, that the Board approve the inclusion of CalSTRS as a named amicus curiae.

PROPOSED
RESOLUTION
OF THE
TEACHERS' RETIREMENT BOARD
INVESTMENT COMMITTEE

Subject: Proposed Amicus Brief
ADM Litigation

WHEREAS, the United States Supreme Court has granted certiorari in the matter of Felzen, et.al. v. Andreas, et.al. (ADM litigation); and

WHEREAS, the Board has been asked to join an amicus curiae brief in support of the interests of institutional shareholders in this litigation; and

WHEREAS, the Investment Committee has determined that it is in the interests of the System to join in so long as the Chief Counsel determines that the brief appropriately reflects the interests of the System;
Therefore be it

RESOLVED, that the Committee approves the participation of the System in the proposed amicus brief as long as the Chief Counsel has reviewed and approved such brief prior to its filing.

Adopted by:

Investment Committee

on _____

James D. Mosman
Chief Executive Officer